COOPER PETROLEUM, INC.

IBLA 83-20 Decided June 7, 1983

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting applications for asphalt prospecting permits. W-76138, W-76139, and W-76140.

Affirmed.

1. Asphalt and Bitumen Leases -- Mineral Leasing Act: Lands Subject to -- Oil and Gas Leases: Lands Subject to -- Tar Sands

   An asphalt prospecting permit application which was pending at the time of the passage of the Combined Hydrocarbon Leasing Act of 1981, 95 Stat. 1070 (1981), must be rejected because that Act amended the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (Supp. V. 1981), to include a definition for "oil" that encompasses asphalt. One seeking to extract hydrocarbons from asphalt after November 16, 1981, in an area other than a "special tar sand area" must file a noncompetitive oil and gas lease offer. The holder of an oil and gas lease issued on or after November 16, 1981, may develop all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).

2. Mineral Leasing Act: Combined Hydrocarbon Leases -- Oil and Gas Leases: Relinquishment -- Tar Sands

   Although oil and gas leases issued prior to the enactment of the Combined Hydrocarbon Leasing Act of 1981, 95 Stat. 1070 (1981), and located completely within

> special tar sand areas may be converted to combined hydrocarbon leases, that Act did not affect oil and gas leases issued prior to the Act which are located outside such areas. The Department has no authority to convey any rights to tar sand on oil and gas leases issued prior to November 16, 1981. A lessee seeking to develop the tar sand on such a lease must relinquish its lease and seek a new oil and gas lease.

APPEARANCES: Jo Ann Piazzi, Land and Legal Manager, Cooper Petroleum, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Cooper Petroleum, Inc. (Cooper), appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated August 27, 1982, which rejected its asphalt prospecting permit applications, W-76138, W-76139, and W-76140. BLM stated in the decision:

> Under the provisions of Public Law 97-78, effective November 16, 1981, the Mineral Lands Leasing Act of 1920 was amended deleting native asphalt, solid and semi-solid bitumen, and bituminous rock by inserting in lieu thereof gilsonite. 1/
>
> This Act repealed the Bureau of Land Management's authority to issue Prospecting Permits for asphalt as previously provided for in the 1920 Act, and the regulations 43 CFR 3500.0-3(a)(5).

Further, BLM noted that the Act did not provide a grandfather clause for applications pending prior to its effective date. Cooper's applications had been filed July 15, 1981.

Cooper's three applications encompass 7,316.25 acres, more or less, in Big Horn County, Wyoming. Cooper asserts that it is the holder of oil and gas lease W-75542, issued with an effective date of October 1, 1981, which covers 2,000 acres also included in the prospecting permit applications.

Cooper finds itself in a dilemma. On appeal it states:

> The reasons Cooper Petroleum, Inc. seeks the asphalt permits on both the lands subject to lease W-75542 and other lands in the

1/ The Act referred to by BLM is commonly known as the Combined Hydrocarbon Leasing Act of 1981, 95 Stat. 1070 (1981). It amended sections 181, 182, 184, 209, 226, 241, 351, and 352 (30 U.S.C.) of the Mineral Leasing Act of 1920.

> vicinity is that it is Cooper Petroleum's opinion that hydrocarbon substances exist in the lands, which substances cannot be extracted by means of ordinary oil and gas producing techniques. Therefore, Cooper Petroleum intends to use the rights granted to it by the permits to test the feasibility of unconventional means, such as mining or retort in situ, to extract the liquid hydrocarbons from the asphalt sands. Such methods of extraction could not be utilized by the lessee under the terms of an oil and gas lease from the United States issued up to and including November 15, 1981.

Cooper asserts that by rejecting the prospecting permits, BLM "has created a situation in which there is no legal means by which the hydrocarbon substances contained in the asphalt or bituminous sands underlying these lands may be extracted" (Statement of Reasons at 3). (Emphasis in original.) This assertion is incorrect.

[1] The pertinent part of the Mineral Leasing Act, 30 U.S.C. § 181 (Supp. V. 1981), as amended by, the Combined Hydrocarbon Leasing Act of 1981, 95 Stat. 1070 (1981), provides:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas, and lands containing such deposits owned by the United States, * * * shall be subject to disposition in the form and manner provided by this chapter * * *.
>
> The term "oil" shall embrace all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).
>
> The term "combined hydrocarbon lease" shall refer to a lease issued in a special tar sand area pursuant to section 226 of this title after November 16, 1981.
>
> The term "special tar sand area" means (1) an area designated by the Secretary of the Interior's orders of November 20, 1980 (45 FR 76800-76801) and January 21, 1981 (46 FR 6077-6078) as containing substantial deposits of tar sand.

The Combined Hydrocarbon Leasing Act of 1981 established a combined hydrocarbon lease and eliminated the distinction between oil and tar sands. It deleted references to "native asphalt" and "bituminous asphalt" because those substances were included in the new definition of oil. S. Rep. No. 250, 97th Cong., 2d Sess. 4-5, reprinted in 1981 U.S. Code Cong. & Ad. News 1743-44.

The regulations implementing the Combined Hydrocarbon Leasing Act of 1981, 43 CFR Parts 3140 and 3150, contain a section, 43 CFR 3140.1-1 Existing rights, which provides:

> (a) The owner of an oil and gas lease issued prior to November 16, 1981, or the owner of a valid claim based on a mineral location situated within a Special Tar Sand Area may convert that portion of the lease or claim so situated to a combined hydrocarbon lease, provided that such conversion is consistent with the provisions of this subpart.

The effective date of the regulation is June 23, 1982. The preamble to the regulation concerning existing rights provides:

> Several comments were received noting that the proposed regulations were silent as to the status of oil and gas leases and valid claims based on mineral locations that lie only partially within a Special Tar Sand Area. The comments felt that in those situations, the Department of the Interior should allow the entire lease or claim to be converted to a combined hydrocarbon lease. The Combined Hydrocarbon Leasing Act and paragraph (a) of § 3140.1-1 of the final rulemaking state that combined hydrocarbon leases can only be issued within a Special Tar Sand Area. The Department has no authority to issue a combined hydrocarbon lease for lands that are outside of those boundaries. Therefore, oil and gas leases and valid claims that straddle the boundary of the Special Tar Sand Area will have to be split and only that portion which lies within the Special Tar Sand Area can be converted. This suggestion has not been adopted by the final rulemaking. [Emphasis added.]

47 FR 22474 (May 24, 1982).

Thus, only pre-November 16, 1981, oil and gas leases that are entirely within Special Tar Sand Areas can be converted to combined hydrocarbon leases. Cooper acknowledges that the lands under oil and gas lease W-75542 are not within those areas of Utah designated "Special Tar Sands Areas" pursuant to 45 FR 76800 (November 20, 1980) and 46 FR 6077 (January 21, 1981).

BLM had no choice but to reject the prospecting permits in question. The Combined Hydrocarbon Leasing Act of 1981 revoked the authority to issue prospecting permits for asphalt. The fact that appellant's applications were pending at that time is of no moment. Cf. Christian F. Murer, 57 IBLA 333 (1981) (phosphate prospecting permit application rejected where subsequent to filing, the area was designated a known phosphate leasing area). However, contrary to appellant's contention, the rejection of the permits does not preclude extraction of the hydrocarbons from asphalt. The Act redefined oil to include asphalt. Therefore, one seeking hydrocarbons from asphalt after November 16, 1981, in an area other than a "special tar sand area" must file a noncompetitive oil and gas lease offer. The holder of such a lease issued on or after that date may develop all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons). BLM has provided that the following term be added to oil and gas leases issued on or after November 16, 1981:

> Under the provisions of Public Law 97-78, this lease includes all deposits of nongaseous hydrocarbon substances other than coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons). Development by methods not conventionally used for oil and gas extraction such as fire flooding and including surface mining will require the lessee to submit a plan of operations and will be subject to regulations governing development by such methods when those rules are issued by the Bureau of Land Management (BLM), the USGS, and the rules or procedures of the surface managing agency, if other than BLM. Development may proceed only if the plan of operations is approved.

BLM Instruction Memorandum No. 82-75 (November 17, 1981).

[2] Appellant is precluded from developing the asphalt under its present oil and gas lease W-75542 issued prior to November 16, 1981. The development of tar sand in areas outside of the special tar sand areas was addressed by BLM in Instruction Memorandum No. 83-16, dated March 31, 1983, which stated:

> The Congress recognized that the richest Federal tar sand deposits were found in eleven areas of Utah. It designated these areas as Special Tar Sand Areas and for these areas only created a new leasing mechanism; the combined hydrocarbon lease. This lease conveys the same mineral rights as new oil and gas leases but contains different acreage limitations, primary terms, and other such provisions. The Congress provided a grandfather clause for oil and gas leases and mining claims located within these areas through a process whereby the leases or claims are noncompetitively converted to combined hydrocarbon leases. No authority was provided to the Department for expansion of these Special Tar Sand Areas or for the creation of new ones.
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> The Combined Hydrocarbon Leasing Act did not provide a grandfather clause applicable to the new definition of oil. Therefore, oil and gas leases outside of the Special Tar Sand Areas issued prior to the passage of the act were not affected by the legislation. The Department has no authority to convey any rights to tar sand found on oil and gas leases issued prior to November 16, 1981. Tar sand development on these leases will have to await the relinquishment of the current oil and gas lease and the issuance of a new one. Renewal leases will convey the rights to the tar sand only if the lease were renewed on or after November 16, 1981. [Emphasis added.]

Appellant's remedy in this case is to relinquish its present oil and gas lease and seek oil and gas leases for the acreage for which it has filed these prospecting permits.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member